ROHANI BINTI MUDA v. MOHAMED RAHIM BIN AWANG & ANOR. (THE PEOPLE'S INSURANCE COMPANY OF MALAYA LTD., INTERVENING)

[O.C.J. (Abdul Razak J.) March 8, 1975]
[Kota Bharu — Civil Suit No. 105 of 1974]

Insurance — Motor insurance — Relationship between insurer and insured — Rights of insured subrogated to the insurer — Road Traffic Ordinance, 1958, s. 80(2)(a).

Equity — Judgment in default — Application to set aside — Party applying at fault — Court's refusal to aid party at fault.

The plaintiff sustained injuries as a result of an accident which occurred on August 29, 1973 between the defendants' car and the plaintiff while the latter was riding a bicycle. The action was commenced on August 17, 1974. Prior to this, on December 20, 1973, the plaintiff served on the intervener a notice under section 80(2)(a) of the Road Traffic Ordinance that they would bring an action against the insurer. The defendants had apparently informed the company of the accident. When negotiations broke down, the plaintiff proceeded to file her claim on August 17, 1974 which was served on the defendants on August 20, 1974. No appearance was filed to that action. On September 24, 1974, the plaintiff obtained judgment in default of appearance against the insured. The judgment was duly served on the intervener.

The intervener sought to set aside the judgment in default of appearance, and contended that they were never informed by their clients, the defendants, of the writ nor served with one.

Held, dismissing the intervener's application: (1) as between the insurer and the insured, the insurer was entitled to the advantage of every right of the insured connected with the insurance effected between them. The rights of the insured were subrogated to the insurer;

(2) the purpose of section 80(2)(a) of the Road Traffic Ordinance was to compel the insurance company as long as they knew of an impending action to pay wherever judgment was entered against their insured;

(3) it was imperative therefore on the part of the insurance company to seek their clients instead of waiting for them, if that was necessary for the protection of their interest;

(4) where the parties were fully aware of their rights and remedies and were open to take all the steps that were before them but dragged their feet instead then it was only doing substantial justice to the parties if the utter laches and inaction of one was not made to pass at the expense of the other especially if the unfortunate circumstance and position of one called for the extreme vigilance by the other.

Cases referred to:-

(1) *Trieste* v. *Empress Assurance Corporation* [1907] 2 K.B. 814.

(2) *Johannes Koplan* v. *Aw Chen* [1970] 1 M.L.J. 221.

(3) *Smith* v. *Clay* (1767) 3 Bro. e.c. 639*n*; Amb. 645; 27 E.R. 419.

CIVIL SUIT.

A. Wilson for the applicant/intervener.

Mahmood Adam for the plaintiff.

Cur. Adv. Vult.

Abdul Razak J.: This is an application to set aside the judgment in default of appearance.

The action is in respect of an accident which occurred on August 29, 1973 between the defendant's car and the plaintiff while the latter was riding a bicycle as a result of which she suffered injuries. The action was commenced on August 17, 1974 almost a year later but, before it, on December 20, 1973 the plaintiff served on the insurance company for the defendant, the intervener in this case, as they were required to do a notice under section 80(2)(a) of the Road Traffic Ordinance that they would bring an action against the insurer. The defendants apparently also informed the company as they would have done of the accident. We do not know when. The company has chosen not to tell. I can only suggest that since they are defending it must have been well within the stipulated time in the insurance policy. Subsequently, the company sought to settle the matter out of court and there apparently were protracted negotiations for about 8 months in that direction but finally they came to a halt because on June 8, 1974 the plaintiff sent an ultimatum to the company to accept within 14 days their final offer failing which legal proceeding would take its due course. There was no reply to that letter and 2 months later, on August 17, 1974 the plaintiff filed her present claim which was served on the defendants on August 20, 1974. No appearance was filed to that action. The plaintiff sent another letter giving the defendants a further 2 days in which to enter their appearance. The defendants did not do so. The plaintiff then proceeded to take the only course open to her to enter judgment in default. This she did on September 24, 1974. The judgment was duly served on the intervener and was received by them.

The company in their affidavit says as their ground for setting aside the judgment that they were never informed by their clients, the defendants, of the writ nor served with one. Their counsel also said that they were not served with the writ but the company had knowledge of the impending action as early as August 1974 and to the extent that the counsel for the company said that the plaintiff was negotiating with them, they must have knowledge of it too, although counsel has chosen not to tell when. I can only assume it must have been at or about the same time otherwise their silence is unexplainable. Why have the company or their solicitors not taken the necessary steps to take over the conduct of the case from the defendant. The law is clear that as between the insurer and the insured the insurer is entitled to the advantage of every right of the insured connected with the insurance effected between them. *Trieste* v. *Empress Assurance Corporation*.(1) The rights of the insured/the defendants are subrogated to the insurer. They say they were negotiating. But negotiation, as they know, do not always result in settlement. From the moment notice was given the company or their solicitors could have written to the plaintiff's solicitors that they would accept service of the writ in the name of the insured or the moment they decided on receiving the ultimatum from the plaintiff's solicitors that they did not wish to comply with it. They adopted neither of these courses although the defendant had apparently been in contact with the company and the latter with their solicitors and the solicitors of the plaintiff at all relevant times before the writ was filed. If the defendant was vigilant enough to find the company in time then it is difficult to believe that they could not have done likewise, serving on the defendant notice to convey to them, on receipt, the writ. The company knew enough to ask from the plaintiff's counsel for sketch plans, police reports, the key and photographs

and medical report pertaining to the accident. It speaks well of their experience, having had to deal with this type of cases before. They knew the precise cue; they knew what steps to take to prevent injury to them and protect themselves from any adverse consequences. They have not, however, said why they have not advised the insured what to do in the event of they being served with the writ. On the other hand, it is difficult to imagine that this is the way they would normally conduct themselves exposing them every time to the risk of the judgment being entered against them. The notice under section 80 was served on the company on December 20, 1973 but it was not until October 2 that they apparently served notice on their counsel. If they had done so only on June 8, 1974 then whose fault is it that they were prejudiced. They were delaying matters. The plaintiffs were only doing what was expected of them if they were forced to take the extreme measures. The defendant and insurer's conduct was consistent with being utterly negligent or else blatantly indifferent. For the court to lend its hand in aid would be at the expense of the plaintiff who had been at great pains to do all that needs to be done and who is not found to be in any way at fault. I think the objection of section 80 would be defeated if although they had notice, the defendant, nevertheless, can set aside a judgment simply because the writ had not been served on them when the rule does not require it, when clearly it is their duty to seek it from the defendant. It seems obvious that the purpose of section 80(2)(a) is to compel the insurance company as long as they know of an impending action to pay wherever judgment is entered against their insured. It is not concerned with how the judgment is obtained or how they came to know. It may be hard and unjust at times on the insurer but it would be harder and more unjust still on the innocent victims for whom they seek to protect, if the law is not so. It is imperative therefore on the part of the insurance company to seek their clients instead of waiting for them, if that is necessary for the protection of their interest.

I was referred to the case of *Johannes Koplan* v. *Aw Chen.*[2] Whatever the authority seeks to say it cannot be intended to mean that the insurer can set aside a judgment in any event. The case must be distinguished from the present one here. It was arrived at after a consent judgment by the parties to set aside the judgment. There the notice could not possibly be served because the defendant had gone abroad and there was no possibility of getting him. It was served on the defendant's counsel only not the defendant and the former did nothing to advise his client to take the necessary steps to ensure that the claim is heard on its merits. The situation here is just the reverse. The defendant was served with the writ and the notice was served not on the solicitors but on the company itself. In addition, the company's solicitors also had notice of the impending action.

I had a look at the sketch plan but without prejudicing my mind entirely by it, it clearly shows where the defendant was at the time of the accident.

In my view in a situation like this where the parties are fully aware of their rights and remedies and are open to take all the steps that are before them but did not but dragged their feet instead then it is only doing substantial justice to the parties if the utter laches and inaction of one is not made to pass at the expense of the other especially if the unfortunate circumstance and position of one calls for the extreme vigilance by the other. If they do not then it is only fair that they pay for their own default.

There has been a considerable delay for want of good reason and as Lord Camden said in *Smith* v. *Clay*[3] (see *Snell's* Principles of Equity, 25th Edition p. 31):

"A court of equity has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing."

In the circumstances, I therefore, dismiss the intervener's application with costs.

Intervener's application dismissed.

Solicitors: *Richard Talalla & Co.; Mahmood Adam & Co.*

PUBLIC PROSECUTOR v. KEE AH BAH

[A.Cr.J. (Syed Othman J.) February 4, 1976]
[Johore Bahru — Criminal Appeal No. 59 of 1974]

Criminal Law and Procedure — Attempt at fraudulent evasion of export duty on tin ore — "Remote" acts and "immediate" acts — Principles governing acts of "attempt" — Customs Act, 1967, ss. 80, 88, 112 & 135(1)(e), (i).

Customs and Excise — Evasion of export duty — Attempt at — Customs Act, 1967, ss. 80, 88, 112 & 135(1)(e), (i).

On April 25, 1973, three customs officers were laying in wait at the export gate at the Johore Bahru Causeway for motor-car J.K. 3856. At about 5.30 p.m. the car was seen leaving the immigration check point and approaching the customs checkpoint. The first officer on seeing the car signalled the others to be on the alert. One was at the export gate near the check point, and the other was at the emergency gate which was further up the export gate and was about the beginning of the causeway leading to the border between Johore and Singapore in the middle of the causeway. The officer manning the emergency gate on being alerted closed the gate. The car was then about 10 yards from the check point. There were two cars ahead of it. The officer at this gate signalled the respondent who was driving to stop. But the respondent reversed and made a U-turn, ignoring the first officer's shout to stop. With a revolver in his hand, the officer leapt on to the bonnet of the moving car and tried to get into it by smashing the windscreen with his revolver. In the process, the revolver was thrown into the car and the officer off the car. The car got away through a gap in the kerb beside the road. The gap was after the immigration point leading to a road back to town. The car was later found and the respondent was taken to the police station. The revolver was recovered when the respondent led them to a spot where he had thrown it. The car was taken to customs and in it were found 21 bags of tin ore, 2 in the boot, 3 under the seat, and 16 in a special compartment between the back rest of the rear seat of the car and the engine. The car was a Volkswagon with an engine at the back.

The prosecution appealed against the acquittal of the respondent. The learned President held that the respondent had no case to answer on a charge of having been knowingly concerned in an attempt at fraudulent evasion of export duty on 21 bags of tin ore weighing 9.45 piculs, an offence under section 135(1)(e) and punishable under section 135(1)(i) of the Customs Act, 1967.